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Term No. 194.
General No. 19655.

In the Supreme Court of the United States.

October Term, 1905.

WILLIAM S. POPPLETON,
Appellant,

vs.

SUMNER WALLACE, ET AL.,
Appellees.

ARGUMENT FOR APPELLANT.

Appeal From The United States Circuit Court of Appeals For the Eighth Circuit.

RICHARD S. HORTON,
For Appellant.

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The appellant, William S. Poppleton, is the owner of fifty-six and one-fourth shares of capital stock of the American National Bank of Omaha, Nebraska. The decree appealed from affirms the decree of the Circuit Court of the United States for the District of Nebraska, which subjects him to an individual liability under Revised Statutes, section 5151, for alleged debts of the bank.

Prior to the 21st day of December, 1895, the American

National Bank and the Union National Bank of Omaha were each domiciled in the State of Nebraska, doing business in Omaha.

At that date the *Board of Directors* of the American National Bank at a special meeting adopted a resolution authorizing its officers to execute and carry out an agreement which recited the following:

> "*Whereas*, the officers of this bank and the officers of the Union National Bank of Omaha, Nebraska, have negotiated and agreed upon the *sale* by this bank to the Union National Bank, of the business and assets of this bank, on the terms and conditions embodied in the agreement of which the following is a copy, towit:"

(Here follows a copy of the agreement. See Exhibit 7, Record, p. 255).

By the agreement the American National undertook to obligate itself as follows:

(1) To sell and assign to the Union National Bank its business, its cash on hand and cash items, its office furniture and fixtures, and such of its bills receivable as the Union National should accept as cash and without recourse.

(2) To sustain and pay one-half the loss which should be sustained by the Union National by reason of its removal from its then place of business to the offices occupied by the American National on account of the unexpired term of the lease of the premises then occupied by it, and one-half the loss which the Union National should sustain in the sale of its own furniture and fixtures, the value of which was fixed at $3,750.00.

(3) To *guarantee* the Union National against all loss on account of its assumption of the debts of the American National to its depositors and for bills payable, and in the

execution of such guaranty ("and to this end" is the language used) to make and deliver to the Union National its three promisory notes in equal sums, in the aggregate equal to the sum of the liabilities of the American National assumed by the Union National in excess of the cash and other assets accepted as cash by the Union National; such notes to draw interest, to mature in one, two and three years, respectfully, to be non-negotiable, and all to become due on non-payment of any one when due; and "as further security," to sell to the Union National (the words are: "agrees to sell and assign, and does hereby sell and assign") *all* of its remaining assets, bills receivable, stocks, bonds, personal property, real estate, rights and interest therein, or liens thereon, with the understanding and agreement that the Union National Bank should have and hold said assets and property subject to the right of T. L. Kimball, or his successor, to collect and convert the same into cash for the purposes set forth in the contract.

The Union National undertook to bind itself:

(1) To take the furniture and fixtures of the American National at the sum of $3,750.00, and to purchase (the words are "agrees to purchase and does hereby purchase") the business, cash on hand and such bills receivable of the American National as it (the Union National) should be willing to take as cash and without recourse.

(2) To assume all the liabilities of the American National to its depositors and on account of its bills payable.

(3) To liquidate the remainder of the assets of the American National (exclusive of the portion taken as cash) without any charge or expense therefor, except such court charges and attorney's fees as might be found necessary.

The agreement was executed Saturday evening, and on Monday morning the Union National had moved into the offices theretofore occupied by the American National and the depositors balances were transferred from the books of the American National to the books of the Union National, to be paid by the latter as demanded in the course of business. The bills payable indebtedness of the American National was afterwards paid, and the Union National received all the assets of the American National, which included cash and cash items, amounting to the sum of $46,167.79. None of the bills receivable of the American National were at the time taken as cash by the Union National, but it was found (December 23, 1895), that the liabilities assumed by the Union National exceeded the amount of the assets taken as cash, by the sum of $240,929.51, and thereupon, Thomas L. Kimball, as President, and Henry Wyman, as Cashier, executed in the name of the American National, three promissory notes, so-called, for the sum of $67,000.00 each, dated December 23rd, 1895, payable to the Union National, in the terms provided for in the agreement. (Record pp. 252-3). They also gave to the Union National a "Cashier's check" for $39,929.51. The three notes, and the cashier's check, it will be observed, aggregate the sum of $240,929.51, the amount of the indebtedness which the Union National had assumed the payment of, in excess of the assets taken by it as cash.

The Cashier's check for $39,929.51 was soon paid, partially by accepting bills receivable as cash, and the remainder in the course of the liquidation of the assets taken by the Union National for that purpose, which left $201,000 of the sum assumed by the Union National to be gotten out of the remaining assets, and which the American National by the agreement of December 21, 1895, guaranteed

would be realized; that is, it guaranteed the Union National against loss. This sum of $201,000.00 was represented by the three notes for $67,000 each and is the alleged indebtedness of the American National for which it is sought, in this suit, to charge the share-holders individually.

The decree which was entered in this suit by the Circuit Court shows that the assets of the American National have disappeared, and there remains unpaid on the notes $194,466.35. Or to put it in another way, there has been credited on the principal of the notes only $6,533.65, although complainant and the Union National have received *as payments* upon the notes $66,330.40 (see page 5 of Exhibit 33, page 290; and Burness p. 228), and $14,637.86 (see order, p. 225) making a total of $80,968.26. That is, $74,434.61 ($80,968.26 less $6,533.65) has been absorbed by way of interest on the three notes, and this is directly due to the *prolongation* of the liability of the American National by reason of this transaction. Nor does this include the $10,258.50 expended on account of other items of interest (see pp. 291 and 292); nor the $5,827.15 expended on account of taxes from 1895 to 1900—the greater portion of which items were directly traceable to such *prolongation*. (See pp. 292 to 296).

The amount due from appellant, as found by the decree, is $5,469.18, which represents $97.23 for every share of one hundred dollars. From this it will be observed that if the directors had submitted the matter to the Comptroller and he had required the share-holders to make good the entire capital stock, appellant would have had to pay but $2.97 per hundred dollars more than he has been adjudged to pay by the Circuit Court, and the share-holders would have had all the assets of the American National Bank.

ASSIGNMENT OF ERRORS.

1st. The Circuit Court of Appeals erred in its decree in holding it was not essential to the maintenance of the suit in the court below (towit—in said Circuit Court for the District of Nebraska) that the complainant (Sumner Wallace) should have first reduced his demand to judgment.

2nd. The Circuit Court of Appeals erred in its decree affirming the decree and judgment of the Circuit Court for the District of Nebraska; that is to say,—in holding that the suit is one to wind up the affairs of a national bank and a suit arising under the laws of the United States of which the Circuit Court had jurisdiction.

3rd. The Circuit Court of Appeals erred in its interpretation of the contract of December 21st, 1895, between the American National Bank and the Union National Bank and in holding the same to be merely a contract by which "the Union National Bank assumed the payment of the liability of the American National Bank to its depositors and on account of bills payable, and in return was to receive its cash, cash items and such bills receivable as the former was willing to accept at par and without recourse. The difference between the aggregate of the amount received and the gross amount of liabilities assumed was to be represented by three non-negotiable promisory notes of the American National, the payment of which was to be secured by a pledge of all of its remaining assets to Thomas L. Kimball, as Trustee," which erroneous interpretation was material to the final conclusions of the court.

4th. The Circuit Court of Appeals erred in holding that the contract of December 21st, 1895, between the American National Bank and the Union National Bank had been ratified by the share-holders of the American

National Bank; that the individual liability of share-holders under section 5151 of the Revised Statutes of United States might, therefore, be enforced.

5th. The Circuit Court of Appeals erred in holding that complainants, Sumner Wallace and the Union National Bank, could go behind the contract of December 21st, 1895, and that their claims were, in equity for the "contract, debts and engagements" of the American National Bank for which share-holders are made individually liable, under Section 5151 of the Revised Statutes.

6th. The Circuit Court of Appeals erred in holding that said appellant had ratified the contract of December 21st, 1895.

7th. The Circuit Court of Appeals erred in holding that the other stock-holders of the American National Bank could ratify said contract of December 21st, 1895, on behalf of said appellant and in holding that said appellant was bound by the *ultra vires* acts of the directors of the said American National Bank by reason of the alleged conduct of and ratification by a majority of the stock-holders of said American National Bank.

BRIEF.

The errors complained of in the first five assignments of error are exhaustively discussed in the briefs of W. W. Morseman, Esq. and Howard B. Smith, Esq. We will therefore confine ourselves in this brief to the errors complained of in the sixth and seventh specifications.

We will assume that it has been established that the contract entered into between the Union National Bank and the American National Bank on December 21st, 1895,

created no liability which could be enforced against the share-holders of the American National Bank, except upon the application of the doctrine of ratification or estoppel.

The Court of Appeals states in its opinion:

> "It is contended that in making the contract, executing the notes and transferring its assets, the American National Bank transcended its corporate powers and that no debt was thereby created which could be enforced against its share-holders. *Ward vs. Joslin*, 186 U. S. 142." (Record 398).

In *Ward vs. Joslin*, referred to by the court, it was stated: (page 151)

> "If, however, under the state decisions, the corporation would be held estopped from denying the liability, it does not follow that the stock-holders must, therefore, be held liable, if the obligation was in fact incurred without authority. In other words, alleged liabilities incurred without authority, and which do not come within the meaning of the word 'dues' as used in the state constitution, cannot be properly treated as brought within the scope of that word, simply because the corporation may be so situated as to be estopped from denying their validity."

The Court of Appeals further states:

> "We may at the outset omit any consideration of what might be the case were these transactions dependent alone upon the authority of the officers and the board of directors of the bank, for the evidence shows clearly that what was done by them was ratified and confirmed by the shareholders. The contract of December 21, 1895, was executed by Thomas L. Kimball as President of the American National, pursuant to the instruction of a resolution of its Board of Directors. At the annual meeting of shareholders held January 14th, 1896, at which 1665 shares of a total of 2,000 shares of stock were represented, the contract was read and an explanation made by the President of the condition of the bank which led up to and made its execution necessary. This was followed at the same meeting by the adoption of the

resolution by the votes of those representing more than 1,600 shares of stock, instructing the directors to take action looking to the liquidation of the bank." (Record p. 398).

It must be remembered that the appellant had no knowledge of the contract of December 21st, 1895, until after the transfer had been consummated. The proposed liquidation was not to be carried out under the provisions of the statutes governing liquidation. The American National had by the agreement of December 21st, 1895, lost all power to liquidate its assets through its own board of directors and officers. The so-called liquidation was to be simply an incident in the perfection of the sale from the American National to the Union National.

Three weeks prior to the meeting of January 14th, 1896, the American had abandoned its business and turned over its assets to the Union. Prior to January 14th, 1896, no opportunity was given appellant to object or protest in any manner. The first opportunity he had to register his disapproval of the contract entered into between the two banks was at the shareholders' meeting of January 14th, 1896. We quote from the minutes of that meeting: (Record p. 261).

"On motion of Mr. Baird, seconded by Mr. Charlton, the following resolution was adopted, the only vote in the negative being that of Mr. W. S. Poppleton who represented fifty-six and one-fourth shares:

RESOLUTION.

'*Resolved*, that the directors of the American National Bank of Omaha, Nebraska, be and hereby are instructed to take action looking to the liquidation required by law.' "

It will be observed therefore that Mr. Poppleton did not at this meeting do anything to ratify the action of the Directors in disposing of the assets of the American National

Bank, nor did he do anything which could induce the Union National Bank, relying upon his conduct, to change its position to its detriment. It is submitted that he could have done nothing more than he did do to show his disapproval of the action of the directors, and to place himself squarely on record so that the Union National could not be misled as to what his position was in the premises. A motion by him that the action of the directors in making the sale be repudiated would have had no more effect than his refusal to approve the resolution proposing liquidation, which was a part of the consummation of the contract entered into December 21st, 1895.

According to the reasoning of the Appellate Court, a resolution offered by Mr. Poppleton repudiating the action of the directors, if voted down by two-thirds of the stockholders, would have resulted in a ratification by Mr. Poppleton, or would have constituted an estoppel as to him.

We contend that if the action of the directors in disposing of the assets of the American National Bank was *ultra vires*, no act or conduct on the part of any other stockholder can work an estoppel as to Mr. Poppleton, or constitute a ratification by him.

The contract of December 21st, 1895, being out of the ordinary course of banking business, did not result in creating any statutory liability of the stockholders. Any liability that may exist as to any stockholder has been created by his own contract. The record clearly shows that Mr. Poppleton did not agree to any such liability; that he is not estopped from insisting that the stockholders liability is governed by section 5151 of the Revised Statutes and that he has not by word or act ratified the *ultra vires* acts of the directors of the American National Bank.

The appellate court further states in its opinion:

"Pursuant to this resolution, another meeting of the shareholders was held February 25th, sixteen hundred and ninety-six shares being represented, at which a formal resolution for liquidation in accordance with sections 5220 and 5221 of the Revised Statutes was adopted by a vote of those owning sixteen hundred and thirty-nine and three-fourths shares, being some three hundred more than was necessary under the law. In this resolution it was provided that 'Thos. L. Kimball be, and he is hereby appointed the agent and trustee of the shareholders of such b[illegible] to effect such liquidation.' The significance of this appointment is apparent when it is recalled that Kimball was also designated as the agent or liquidating trustee in the contract of December 21st, 1895." (Record 398).

We quote from the minutes of the special stockholders meeting of February 25th, 1896 (pages 264-6 of record.)

"Mr. William Baird moved the adoption of the following resolution:

'*Resolved*, That the American National Bank, of Omaha, Nebraska, be placed in voluntary liquidation, under the provisions of sections 5220 and 5221, U. S. Revised Statutes, to take effect the 25th day of February, 1896, and that Thos. L. Kimball be and hereby is appointed the agent and trustee of the shareholders of said bank to effect such liquidation.'

Mr. A. R. Dufrene seconded the motion of Mr. Baird.

The motion for the adoption of the resolution was put by the chairman to a vote of the stock represented, and the vote was as follows:

Votes represented in (perfor).

For the resolution: * * * * * * *

Votes represented in person. Against the resolution:

Number of Shares	Voted by
56¼	Poppleton, W. S.

Total stock represented and voted as follows:

For resolution, in person	772½	
For resolution, by proxy	867½	
Total for resolution	1,639½	
Against resolution	56½	
Total shares voted	1,696	
Total Capital stock of bank		2,000 shares
Two-thirds necessary to adopt resolution	1,333⅓	shares.

It appearing that more than two-thirds of the Capital stock had voted in favor of the resolution, the chairman declared the resolution adopted.

Thereupon the meeting adjourned.

THOS. L. KIMBALL, Chairman.

Attest:

HENRY F. WYMAN, Secy."

Certainly there was nothing done at this meeting from which a ratification could be inferred, or which could work any estoppel as to Mr. Poppleton. He could have done nothing more than protest and show his disapproval of the proceeding. The business of the American National Bank had been destroyed; its assets were gone; the directors had abdicated their functions; the damage had been done and he was helpless. If by any conceivable court procedure he could have rescinded the sale and could have had declared illegal the action of the directors, what would have been the result? The credit and standing of the American National was gone. It had ceased to exist as a bank. It was too late to follow the provisions of the statute and by an assessment of the shareholders continue the business. Even if re-opened, the American National would have been a bank under suspicion and without depositors. And on the other hand, of what benefit would an attempt to gain possession of the offices of the American have been to the Union National? That bank had vacated its place of business and would doubtless have been confronted with a

"run," and would also have been compelled to wait for the liquidation of the American by the Comptroller before it could have recovered the amount it had expended in carrying out the agreement. The Union National was in possession. Any proceeding by Mr. Poppleton after the deal had been consummated and the Union National Bank had taken possession could not in any manner have benefited that bank. How then can it be contended that by failing to institute some action the position of the Union National has been changed to its detriment, and that Mr. Poppleton is estopped from insisting that there is no statutory liability as to him by reason of the *ultra vires* acts of the directors in disposing of the business of the American National Bank?

The Appellate Court further states:

> "Another shareholders' meeting was held January 12th, 1897, at which 1531 shares were represented and at this meeting there was presented a comparative statement over the signature of Thomas L. Kimball, Trustee, showing the condition of the bank December 21st, 1895, when the contract was made, and on January 1st, 1897. It included an account of transactions during the progress of the liquidation and an expression of views as to the best course to be pursued with reference to the remaining assets. Reference was definitely and explicitly made in this statement to the Union National and to the payment to it of the proceeds of collections which had been made by the trustee. It was ordered to be spread upon the records of the bank." (Record 398).

Mr. Poppleton was not present at this meeting. (Record p. 276). If he had been there, what could he have done to have further disapproved of the contract of December 21st, 1895? No resolution relating to the sale of the business or the liquidation was before the stockholders.

We quote further from the opinion:

"Shortly after the execution of the contract of December 21st, 1895, and before the adoption of the resolution for liquidation, a writing containing an express ratification of the action of the directors in respect of the contract between the two banks was executed by the owners of more than two-thirds of the stock of the American National." (Record 398).

The record shows that Mr. Poppleton did not sign the writing. (Record p. 277).

We quote further from the opinion of the court:

"When it is considered that the Union National was engaged in carrying out its part of the contract, was disbursing its funds and taking up and caring for the contracts, debts and engagements of the American National, the duty of the shareholders of the latter in meeting assembled, to then repudiate the transaction, if they ever desired to do so, was imperative.

Instead of so doing, they supplemented the transaction with the Union National by proceedings in voluntary liquidation, adopted by a vote largely in excess of that required by law, and conducted such liquidation in connection with and as part of the performance of the contract of December 21st, 1895. Every consideration of equity, good conscience and justice leads to the conclusion that the shareholders should be held to have ratified and approved what was done and what was then being done." (Record 399).

Mr. Poppleton did all he could to repudiate the transaction. He had no conrol of the other shareholders. It was their privilege to ratify the transaction, if they so desired. Their acts, however, bound only themselves.

Assuming, for the sake of argument, that a majority of the stockholders could ratify the *ultra vires* acts of the directors of the American National Bank, certainly they could not, by estoppel, create a statutory liability as to Mr. Poppleton. Shareholders as a body are without power to enlarge the statutory liability. A share-holder by becoming a member of a corporation does not consent to the exercise of any such powers. He consents to the individual

liability imposed by the statute, but nothing less than his individual consent can enlarge this liability. If that be given, he is not liable under the statute, but according to the terms of his consent.

It is said in *Ward vs. Joslin*, 186 U. S. pp 142-151:

> "Rights of stock-holders must be considered as well as those of creditors, and they should not be held directly liable unless such liability was within their contract in legal contemplation."

We respectfully submit that there is nothing in the record to show any ratification or approval by Mr. Poppleton of the contract of December 21st, 1895.

Richard S. Horton

Counsel for William S. Poppleton.